

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

KEVIN JEROME SMITH, #14001019,
Plaintiff,

v.

JOHN HAMPTON READ, II,
Defendant.

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3:14-CV-3193-N-BK

**FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

On September 5, 2014, Plaintiff, a county inmate, filed a *pro se* complaint under [42 U.S.C. § 1983](#) against Defendant John Hampton Read, his court appointed counsel, which was automatically referred to the magistrate judge. *See* [28 U.S.C. 636\(b\)](#) and Special Order 3. The undersigned granted Plaintiff's motion to proceed *in forma pauperis*, but did not issue process pending preliminary screening. For the reasons that follow, this case should be summarily dismissed.

I. BACKGROUND

Plaintiff complains that Read rendered constitutionally ineffective assistance of counsel during the course of his pending criminal case, *State v. Smith*, No. F14-51119 (204th Judicial District Court, Dallas County). [[Doc. 3 at 4](#)]. Specifically, he asserts that Read has failed to communicate with him, requested continuances without his consent, and submitted guilty-plea documents without first discussing the matter with him. [[Doc. 3 at 4](#), 6]. In essence, Plaintiff contends that Read misrepresented him throughout his criminal case. [[Doc. 3 at 7](#)]. Plaintiff requests that a new attorney be appointed to represent him in the state criminal case and that he be awarded \$375,000 in damages. [[Doc. 4](#)].

II. ANALYSIS

Because Plaintiff is proceeding *in forma pauperis*, the complaint is subject to screening under [28 U.S.C. §§ 1915\(e\)\(2\)\(B\) and 1915A\(b\)](#). Those statutes provide for *sua sponte* dismissal of a complaint if the Court finds that it (1) is frivolous or malicious, (2) fails to state a claim upon which relief may be granted, or (3) seeks monetary relief against a defendant who is immune from such relief. A complaint is frivolous when it “lacks an arguable basis either in law or in fact.” [Neitzke v. Williams, 490 U.S. 319, 325 \(1989\)](#). A claim lacks an arguable basis in law when it is “based on an indisputably meritless legal theory.” [Id. at 327](#).

The Court liberally construes Plaintiff’s filings with all possible deference due a *pro se* litigant. See [Haines v. Kerner, 404 U.S. 519, 520 \(1972\)](#) (allegations of *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers). Even under this most liberal construction, however, Plaintiff’s complaint is frivolous.

Plaintiff cannot satisfy the “under color of state law” requirement with respect to Attorney Read for acts and omissions during his state criminal prosecution.¹ See [Polk County v. Dodson, 454 U.S. 312, 324-25 \(1981\)](#) (public defender does not act under color of state law in representing a defendant in a criminal case); [Mills v. Criminal Dist. Court No. 3, 837 F.2d 677, 679 \(5th Cir. 1988\)](#) (same as to court appointed attorney). In addition, insofar as Plaintiff requests the appointment of a new attorney, his request is not cognizable in this section 1983 action.

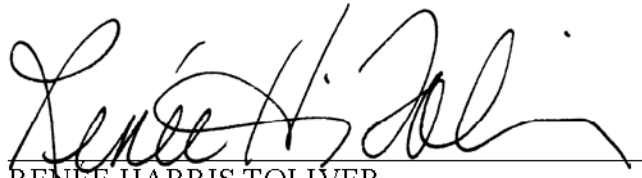
Consequently, Plaintiff’s civil rights complaint lacks any basis in law and should be dismissed as frivolous.

¹ To pursue a claim under [section 1983](#), a plaintiff must allege (1) that he was deprived of a right secured by the Constitution or laws of the United States; and (2) that the deprivation was caused by one acting under color of state or federal law. [West v. Atkins, 487 U.S. 42, 48 \(1988\)](#).

III. RECOMMENDATION

For the foregoing reasons, it is recommended that the complaint be summarily **DISMISSED** with prejudice as frivolous. See [28 U.S.C. §§ 1915\(e\)\(2\)\(B\) and 1915A\(b\)](#). This dismissal will count as a “strike” or “prior occasion” within the meaning of [28 U.S.C. § 1915\(g\)](#).²

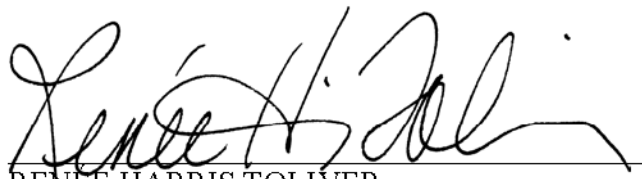
SIGNED September 8, 2014.



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INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. See [28 U.S.C. § 636\(b\)\(1\)](#); [FED. R. Civ. P. 72\(b\)](#). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge’s report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See [Douglass v. United Services Automobile Ass’n](#), 79 F.3d 1415, 1417 (5th Cir. 1996).



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² [28 U.S.C. § 1915\(g\)](#), commonly known as the “three-strikes” provision, provides: “[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section, if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”